

THE DEPARTMENT OF THE TREASURY
OFFICE OF PROFESSIONAL RESPONSIBILITY
INTERNAL REVENUE SERVICE
WASHINGTON, D. C.

DIRECTOR, OFFICE OF
PROFESSIONAL RESPONSIBILITY
Complainant

v.

Complaint No. 2005-13

ROBERT ALAN JONES
Respondent

SUPPLEMENTAL DECISION ON REMAND

Robert A. Giannasi, Administrative Law Judge. On October 12, 2007, Special Counsel David F. P. O'Connor, on behalf of the Secretary of the Treasury, issued his decision on appeal, affirming in part, reversing in part and remanding in part the decision of the trial judge in this case, Administrative Law Judge Joseph Gontram. In July 2007, after he issued his decision, but before the Special Counsel's decision on appeal, Judge Gontram died. Because of Judge Gontram's death, I have assigned the remand to myself, in accordance with the agreement between the Internal Revenue Service (IRS) and the National Labor Relations Board, which provides that the Board will provide administrative law judges to hear the type of cases involved herein.

The Special Counsel's decision affirmed most of Judge Gontram's findings underlying his conclusion that Respondent had violated certain sections of Treasury Circular 230 (Rev. 7-2002) (also identified in Judge Gontram's decision and in this decision as various sections of 31 C.F.R.) by signing and filing with the IRS powers of attorney forms (Form 2848), which falsely identified three cosigners as Enrolled Agents (EAs); by signing and filing with the IRS powers of attorney forms that certain named taxpayers had not signed, but whose signatures had been "cut and pasted" onto the forms; and by falsely stating on his website that persons associated with Respondent were EAs when they were not. The Special Counsel noted that Judge Gontram found that Respondent "knowingly" engaged in such conduct, but that he had not made required findings on the "willfulness" of such conduct, thus necessitating the remand.¹

¹ The Special Counsel reversed Judge Gontram "[w]ith respect to any Section 10.51(j) charges that relate to Employee 4," because he was a certified public

Continued

I have reviewed supplemental briefs from the parties addressing the remand issue. Based on my review of those briefs, and a consideration of the entire record in this case, including the testimony at the hearing before Judge Gontram, the transcript of the hearing and the exhibits submitted by the parties, as well as the decisions of the Special Counsel and Judge Gontram, I make the following additional findings and conclusions.²

Misrepresentations regarding the status of Employee 1, Employee 2,
and Employee 3

On this aspect of the case, Judge Gontram found that Respondent “violated 31 C.F.R Section 10.22(a) (1), (2) and (3) by failing to exercise due diligence in preparing and assisting in the preparation of, approving, and filing Forms 2848 with the IRS” in which his employees or associates, Employee 1, Employee 2, and Employee 3 “were falsely represented as being EAs.” He further found that Respondent “violated 31 C.F.R. Section 10.51(d) and (j) by giving false or misleading information and participating in the giving of false or misleading information to the IRS in connection with matters pending before the IRS, knowing such information to be false or misleading; and by knowingly aiding and abetting other persons to practice before the IRS during a period of ineligibility of those persons.” He specifically found that, with respect to the Section 10.51 violations, the knowledge and intent requirements of those violations were satisfied because Respondent “admittedly knew” that Employee 3 was not an EA and he “knew or must have known” that neither Employee 1 or Employee 2 met the IRS definition of an EA on the form he signed. Judge Gontram’s decision at p. 10.

In the course of his discussion of the underlying issues, Judge Gontram made subsidiary findings that Respondent “knew Employee 1 and Employee 2 were not Enrolled Agents under [the applicable] definition” Judge Gontram’s decision at p. 5. Judge Gontram rejected as incredible Respondent’s contentions that the forms he signed did not contain false information and that he was not responsible for providing the false information; the judge also rejected Respondent’s contention that he could escape culpability because his definition of an EA was different than that of the IRS. Judge Gontram’s decision at p. 5.

accountant (CPA) and thus authorized to practice before the IRS. But the Special Counsel found that other charges pertaining to Employee 4 “are not similarly defective.” Special Counsel’s decision at p. 4 and n. 3.

² My decision incorporates the findings and conclusions of the Special Counsel and Judge Gontram, but discusses only those pertinent to the issue of “willfulness.” I note that the Special Counsel did not direct the taking of additional evidence (Special Counsel’s decision at p. 3). I also note that Judge Gontram made specific credibility determinations (Judge Gontram’s decision at pp. 5, 7, 8, 11), with respect to Respondent’s knowledge of the facts and the legal requirements of the conduct at issue.

Referring to Respondent's "evasive techniques," Judge Gontram also concluded that Respondent's reliance on discredited testimony that IRS agents had told Employee 1 and Employee 2 to falsify their qualifications showed a "reckless disregard" of their qualifications to practice before the IRS and for the accuracy of the forms he signed. Judge Gontram's decision at p. 7.

As to Employee 3, the Special Counsel upheld Judge Gontram's findings insofar as they supported the notion that her conduct amounted to practice before the IRS, whether or not her activities "were limited to scheduling meetings and hearings." Special Counsel's decision at p. 4. Judge Gontram had found that Respondent "admittedly knew Employee 3 was not an EA, yet he signed Forms 2848 in which she claimed to be an EA." Judge Gontram found Respondent's actions in this respect amounted to "intentional misconduct." Judge Gontram's decision at p. 9.

False signatures

On this aspect of the case, Judge Gontram found that the taxpayers' signatures affixed to the Forms 2848 signed by Respondent were not original, but were in fact "cut and pasted" from some other document and affixed onto the forms. Judge Gontram found that Respondent's claim that he did not know that taxpayers' signatures had been pasted onto the forms he signed and submitted to the IRS was "not credible." He analyzed the forms, noting the exactness of the signatures and the dates next to the signatures and the fact that the signatures were photocopies, and found that it was clear that the taxpayers had not signed the forms. Nor were any of the taxpayers whose signatures appeared on the forms called as witnesses to show that they authorized Respondent to copy their signatures and paste them onto the forms (See Judge Gontram's decision at pp. 10-11 and note 6). Accordingly, Judge Gontram found that Respondent violated Section 10.22(a)(1), (2), and (3) of 31 C.F.R. by "failing to exercise due diligence in preparing and assisting in the preparation of, approving, and filing Forms 2848 with the IRS that falsely represented the taxpayers' signatures." He also found that Respondent violated Section 10.51(d) "by giving false or misleading information and participating in the giving of false or misleading information to the IRS in connection with matters pending before the IRS, knowing such information to be false or misleading." Judge Gontram's decision at p. 11.

Website Misrepresentations

Judge Gontram found that Respondent's website lists himself, Employee 1 and Employee 4 as principals in his operation. Employee 1 is listed as a forensic tax accountant and described as an "Enrolled IRS Agent." Employee 1 was not an EA, as Judge Gontram had previously found. Employee 4 was likewise listed as an EA, even though, as the judge found, he was not, notwithstanding that he was a CPA authorized to represent taxpayers before the IRS. Judge Gontram rejected a separate claim by Respondent that he mistakenly designated Employee 4 as an EA, based on the judge's determination that the claim was not credible. Thus, according to Judge Gontram, Respondent's false designation of Employee 4's status on the website followed the same pattern as his "cavalier and presumptuous"

determination to substitute his definition of EA for that of the IRS as he had exhibited in similarly falsely representing Employee 1, Employee 2 and Employee 3 as EAs. Judge Gontram's decision at p. 12. Accordingly, Judge Gontram found that, by publicizing false representations of the status of Employee 1 and Employee 4 on his website, Respondent violated Section 10.30(a) of 31 C.F.R.

Willfulness

As the Special Counsel stated in his decision at p. 4, under Section 10.52(a) of 31 C.F.R., Complainant is required to prove that the Respondent's violations in this case were "willful." The term "willful," in the context of this case, simply means "a voluntary, intentional violation of a known legal duty." More precisely, the Complainant must prove that the law imposed a duty on Respondent; the Respondent knew of his duty; and the Respondent voluntarily and intentionally violated that duty. Special Counsel's decision at p. 5, citing and discussing applicable authorities. The term, even in a criminal context, does not include a requirement to show "evil motive" or lack of good faith. *U.S. v. Pomponio*, 429 U.S. 10, 11-12 (1976). Indeed, where willfulness is a statutory requirement for civil liability, the Supreme Court has recently confirmed that the term covers "not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. v. Burr*, ___ U.S. ___, 127 S. Ct. 2201, 2208-2209 (2007).

As the Special Counsel pointed out, the provisions Respondent is charged with violating do not involve detailed knowledge of the intricacies of tax law; the very forms Respondent, an experienced tax lawyer, signed reminded him of his duties. Moreover, to the extent that "reasonableness" or the "honesty" of a belief is an issue, "both must relate to what the law is, not what the [Respondent] believes the law should be." Special Counsel's decision at pp. 5-6, citing additional authorities.³

Applying the above principles to the factual findings in this case, I find and conclude that there is clear and convincing evidence on this record that the Respondent's violations in this case were willful.

As shown above, Judge Gontram, based in part on his credibility determinations, found that Respondent knew that Employee 2 and Employee 1 were not EAs and admittedly knew that Employee 3 was not an EA. Yet Respondent listed them as such on Form 2848 that he signed and submitted to the IRS; Judge Gontram also found that such conduct was intentional. In addition, Judge Gontram found that Respondent misrepresented the status of Employee 1 and Employee 4 on his website. He found that Respondent's representation of

³ In these circumstances, Respondent's assertions before Judge Gontram that he believed Employee 2 and Employee 1 fit his definition of enrolled agents and that Employee 3 did not actually represent taxpayers are insufficient to support a finding that he acted reasonably or honestly and thus that his conduct was not willful.

Employee 4 as an EA was part of a pattern of a complete disregard of the IRS's definition of an EA and a determination to substitute his definition of the term for that of the IRS. These findings go a long way to establishing the willfulness of such violations. It is well settled that a trier of fact may make a credibility determination that not only rejects a witness's story, but finds that the truth is the opposite of that story. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962), quoting from *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952).

Respondent had the duty, known to him, to accurately represent the EA status of his subordinates. The duty was stated on the very form he signed. Respondent failed in that known duty by making misrepresentations concerning the status of his subordinates, not because of inadvertence, but because he had a different view of the definition of an EA. His conduct in signing the forms and publishing his website, which contained the known misrepresentations, was deliberate, voluntary and intentional; there is no evidence to support a finding that such conduct was inadvertent, unintentional or involuntary. Respondent's view of what the law should be cannot trump what the law actually is: The IRS's definition of an EA is what governs. At the very least, the misrepresentations of Respondent's subordinates' EA status were made with a reckless disregard of his duty to provide accurate representations of their status. Thus, Respondent, who was an experienced lawyer and practitioner before the IRS, intentionally and voluntarily made the misrepresentations that led to the violations. I therefore find that the violations were willful within the meaning of Section 10.52(a).

As to the violations that involved the cutting and pasting of signatures on Forms 2848, Judge Gontram also found Respondent knew that the taxpayer signatures were artificially appended to the forms he signed and submitted. Judge Gontram rejected Respondent's testimony that he did not know the signatures were pasted on the forms as "not credible." Judge Gontram analyzed the forms, the signatures and the dates, which were photocopies, and determined that the pasting and cutting of the signatures was obvious to the naked eye. Nor was there any evidence that the taxpayers authorized Respondent to copy their signatures in the manner it was done. These findings amply support the inference that Respondent's violations on this aspect of the case were willful. Again, Respondent had a known duty to accurately obtain taxpayers' signatures on the forms and he failed in that duty. The circumstances militate against inadvertence and fully support a finding that the Respondent's actions were deliberate, voluntary and intentional. Indeed, there is no evidence to the contrary. Accordingly, Respondent's violations were willful within the meaning of Section 10.52(a).⁴

⁴ As the Complainant points out in his brief on remand at pp. 20-22, Judge Gontram not only found, contrary to Respondent's contention, that the misrepresentations were "more than negligent," but he also found that they amounted to a pattern of misconduct. Evidence of a pattern of misconduct supports a finding of willfulness. See *Holland v. U.S.*, 348 U.S. 121, 139 (1954).

Respondent's Contentions on Remand

The Respondent's brief on remand does not directly address the willfulness issue. It makes two basic contentions: (1) The entire case must be retried de novo because a new judge cannot make the demeanor-based credibility determinations allegedly required in the remand; and (2) The Treasury Department must be disqualified from performing any appellate role in this case because of a statement made in the Special Counsel's decision remanding the case. Neither contention has merit.

The Respondent has not shown that the remand in this case requires a trial judge's observation of witness demeanor. Although Judge Gontram made credibility determinations in support of his findings that the Respondent knowingly committed the violations he documented, the Respondent has not shown what is so different about willfulness findings that would require additional credibility determinations, including those assessing a witness's demeanor. Indeed, none of Judge Gontram's credibility determinations were based solely on demeanor evidence. For example, at page 7 of his decision, Judge Gontram rejected the testimony of Employee 1 and Employee 2 that they were told at different times and by different IRS agents to falsify their qualifications on applicable Forms 2848. Although he based his finding in part on witness demeanor, he also found their testimony uncorroborated and implausible. Judge Gontram therefore found the Respondent's conduct in signing the form was done in "reckless disregard" of the accuracy required in the forms. Judge Gontram's other findings of knowing violations were not based exclusively on an assessment of witness demeanor, but rather on his evaluation of objective facts in the record and the plausibility of Respondent's positions. His findings with regard to the cutting and pasting of taxpayers' signatures, for example, were objectively based. In any event, all of the trial judge's findings may be reviewed by an appellate agency independently of the judge's observation of a witness's demeanor. Although the judge's credibility determinations, including those based on demeanor, are entitled to deference, the agency may reverse those determinations if it finds that they are contrary to the weight of the evidence. See *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 363-364 (1955).

As stated above, Judge Gontram's findings with respect to the violations he discussed are sufficient to support inferences that Respondent's knowing violations were also willful violations. Respondent has not shown how observation of witness demeanor would bear on the willfulness issue or how it would bear on that issue in any way different from the findings already made by Judge Gontram about the knowing violations he fully discussed in his decision. He did, after all, hear and see the witnesses in the trial before him. Accordingly, I can see no useful purpose in retrying this case de novo.

The Respondent also alleges that the Treasury Department should be disqualified from performing its appellate role in this case because the Special Counsel made allegedly prejudicial statements in the decision remanding the matter. In his decision, the Special Counsel noted that Judge Gontram found that

the Respondent committed knowing violations, but did not also make a finding as to whether those violations were willful. He also noted that, because the trial judge made the finding that the violations were knowing violations, the judge would have “no difficulty,” on remand, in finding them willful.

I am not sure that I have jurisdiction to pass on Respondent’s allegation that the Treasury Department should be disqualified from performing its appellate role, which essentially accuses the Special Counsel of bias. I can only state that I have not been influenced by the Special Counsel’s “no difficulty” statement. I have independently made my findings of willfulness based on my assessment of the record and Judge Gontram’s findings. The appropriate reviewing body will determine whether my findings are correct. In any event, in my view, Respondent’s accusation of bias is without merit. It is clear that a judicial opinion “formed on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). I find it highly unlikely that the “no difficulty” statement, standing alone, would satisfy the “deep seated favoritism or antagonism” requirement set forth in *Liteky*. In addition, the Respondent’s accusation is highly unusual because most reported cases, including *Liteky* and those cited by Respondent in support of its position, essentially deal with appellate courts passing on the disqualification of trial judges. This is not the situation here. In short, I do not have the authority to decide who reviews my findings or whether any such reviewing body is biased, but, in my view, the alleged disqualifying statement in this case is nothing like the disqualifying conduct in the cases cited by Respondent.

Conclusions

I adopt all of Judge Gontram’s findings, except those reversed by the Special Counsel, and I further find that the violations found by Judge Gontram were shown by clear and convincing evidence to be willful. I also adopt Judge Gontram’s findings and conclusion on penalty, essentially the penalty requested by the Complainant, although I personally think it is somewhat on the lenient side of the scale. Finally, I reject the Respondent’s request that I retry the case de novo because of the death of Judge Gontram.

Dated, Washington, D.C., January 31, 2008.

Robert A. Giannasi
Administrative Law Judge